No. 88-660

Supreme Court, U.S.
FILED
NOV 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SIMKINS INDUSTRIES, INC.,

Petitioner,

v.

SIERRA CLUB,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN F. KING,
*G. MACY NELSON,
ANDERSON, COE & KING,
201 N. Charles Street,
Suite 2000,
Baltimore, MD 21201,
(301) 752-1630,
Counsel for Respondent.

*Counsel of Record

The Daily Record Co., Baltimore, MD 21202

QUESTIONS PRESENTED

1. Should this Court grant certiorari even though the findings by the Court of Appeals of the existence of continuing violations, as well as well-plead jurisdictional facts, under Gwaltney were supported by the uncontroverted facts in the record and pose no new questions of law?

2. Should this Court grant certiorari although Petitioner's argument about standing is based on the incorrect factual assumption that Petitioner's violations had ceased on the date Respondent filed suit and even though this Court has previously considered Petitioner's redressability argument in Gwaltney and in other cases?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES.	iv
PERTINENT STATUTORY PROVISIONS.	vi
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT.	
I. This Court should not grant certiorari because the findings of the Court of Appeals of the existence of continuing violations, as well as of well-plead jurisdictional facts, under Gwaltney were supported by the uncontroverted facts in the record and those findings pose no new questions of law.	8
II. This Court should not grant certiorari because:	
A. Petitioner's argument about standing is based on the incorrect factual assumption that Petitioner's violations had ceased on the date Respondent filed suit; and . . .	16

B. This Court has previously considered Petitioner's redressability argument in Gwaltney and in other cases. 20

CONCLUSION. 29

TABLE OF AUTHORITIES

Cases	Page
Bender v. Williamsport Area School District, 475 U.S. 534 (1986)	25
Gwaltney v. Chesapeake Bay Foundation, Inc. 484 U.S. _____, 108 S.Ct. 376, 98 L.Ed. 2d 306 (1987)	6,12,21,23,24
Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd., 791 F.2d 304 (4th Cir. 1986), vacated 484 U.S. _____, 108 S.Ct. 376, 98 L.Ed. 2d 306 (1987)	5
Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd., 844 F.2d 170 (4th Cir. 1988).	15,16
F.C.C. v. Sanders Brothers Radio Stations, 309 U.S. 470 (1940).	26
Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n., 453 U.S. 1 (1981)	27
Sierra Club v. Morton, 405 U.S. 727 (1972)	26,27
Sierra Club v. Simkins Industries, Inc., 847 F.2d 1109 (4th Cir. 1988)	7

TABLE OF AUTHORITIES (Cont'd.)

Cases (Cont'd.) Page

United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945 24

United States v. SCRAP, 412 U.S. 669 (1973) 26

United States v. W.T. Grant Co., 345 U.S. 629 (1953) 24

Warth v. Seldin, 422 U.S. 490 (1975) 23,25,26

CONSTITUTIONAL AND STATUTORY MATERIALS

Article III, Constitution of the United States vi

33 U.S.C. §1251(a) 12

33 U.S.C. §1365(a) vi

33 U.S.C. §1342 12

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2, Constitution of the United States

The judicial Power shall extend to all Cases, In Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers and Consuls; --to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a party; -- to Controversies between two or more States; -- between a State and Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

33 U.S.C. (1986) §1365 (1986) Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to

the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced--

(1) under subsection (a)(1) of this section--

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

* * * *

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 or this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; or (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title).

(g) Citizen

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

No. 88-860

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

Simkins Industries, Inc.,

Petitioner

v.

Sierra Club,

Respondent

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Respondent, The Sierra Club, respectfully requests that the Petition for issuance of a Writ of Certiorari be denied.

STATEMENT OF THE CASE

On August 31, 1984, Sierra Club (Sierra) notified the State of Maryland, the United States Environmental Protection Agency, and Simkins Industries, Inc. (Simkins) of its intention to file suit against Simkins for failing to file Discharge Monitoring Reports ("DMRs") required by the Clean Water Act.

Sierra's notification letter was not based on an isolated, trivial incident. The violations that Simkins blithely terms "paperwork errors" were, as set forth in Sierra's August 31, 1984 letter and uncontested by Simkins at trial, its continuous failure for almost three straight years to report to the State of Maryland any of the pollutants that it discharged into the Patapsco River and its failure to even sample

its discharge to determine what those pollutants were. The discharge permit issued to Simkins by the State of Maryland required monthly sampling and quarterly filings. The only evidence at trial about the quality of Simkins' discharge was that Simkins' "paperwork errors" resulted in a copper level in the Patapsco at a level 10,000 times the safe level for fresh water, and an oil and grease level two times the maximum limit allowed under Simkins' permit. (J.A. 163-165).

Neither Simkins nor the governmental entities responded to Sierra's letter within the 60 days provided by the citizens' suit provision of the Clean Water Act. In accordance with those provisions, Sierra then filed suit against Simkins on October 31, 1984 in the United States District Court for the District of Maryland. The Complaint, at paragraph 14, incorporated by reference

Sierra's August 31, 1984 "60-day letter." In that letter, which was attached to the Complaint, Sierra had summarized Simkins' failure to file DMRs between August 1, 1981 and March 31, 1984.[1/] The letter also asserted that Simkins continued to be in violation. App. 74a, 76a.

The District Court denied Simkins' Motion to Dismiss and granted Sierra Club's Motion for Partial Summary Judgment on liability. In June, 1985, the court held a trial on the issues of penalties and injunctive relief. The court ordered both parties to submit proposed findings of fact and conclusions of law before closing

---

1/ For a description of Simkins' disregard of public authority and dereliction of its permit obligations, see Murray, J. opinion, App. 49a, paragraph 19 through App. 50a, paragraph 29.

argument. Simkins never asserted that it had filed DMRs on the contents of its wastewater. It never undertook to prove what discharges the missing DMRs would have revealed although its permit was conditioned on its retention of required records for at least three years. Nor did Simkins rebut in any respect the testimony of David Wright, Ph.D., a toxicologist, that a survey of the Patapsco River bottom sediment was necessary to determine the extent of pollution. After closing argument, the District Court advised the parties that it would defer its decision until the Fourth Circuit decided Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd., 791 F.2d 304 (4th Cir. 1986). After the Fourth Circuit's decision in that case, both parties submitted briefs

on its application to this case.[2/] The District Court decided this case on July 31, 1986 and imposed penalties of $977,000 against Simkins as well as counsel fees and costs. App. 57a. It denied the injunctive relief (river sediment survey) prayed by Sierra Club.

Simkins noted a timely appeal. The Fourth Circuit heard oral argument on November 4, 1987. The Supreme Court issued its opinion in Gwaltney on December 1, 1987. One week later, the Fourth Circuit ordered the parties to submit a Supplemental Memorandum on the effect of Gwaltney, 484 U.S. _____, 108 S.Ct. 376, 98 L.Ed. 2d 306

2/Petitioner erroneously states that Respondent never requested penalties of more than $320,000. See Petition at 6. However, Respondent asked the district court to award $9,770,000 in penalties in its post-trial brief (J.A. 383-384), and Petitioner responded to that request. (J.A. 385-386).

(1987), and they did so. On April 5, 1988, the United States moved to intervene for the limited purpose of claiming that any civil penalties be paid to the United States Treasury. Both Simkins and Sierra opposed the govenment's Motion to Intervene because it was irrelevant at the time, and the Fourth Circuit denied the government's motion without prejudice. The Fourth Circuit issued its opinion on May 31, 1988, Sierra Club v. Simkins Industries, Inc., 847 F.2d 1109 (4th Cir. 1988), affirming the District Court in every respect. On June 13, 1988, Petitioner filed a Petition for Rehearing and Suggestion for Rehearing in Banc. The Fourth Circuit denied that Petition on July 27, 1988. It remanded the issue of counsel fees and costs to the trial court.

I. THE FINDINGS BY THE COURT OF APPEALS OF THE EXISTENCE OF A CONTINUING VIOLATION, AS WELL AS WELL-PLEAD JURISDICTIONAL FACTS, UNDER GWALTNEY WERE SUPPORTED BY THE UNCONTROVERTED FACTS IN THE RECORD AND POSE NO NEW QUESTIONS OF LAW.

The Court of Appeals postponed its decision in this case until the issuance of this Court's opinion in Gwaltney, and then carefully applied the jurisdictional teaching in Gwaltney to the record before it. In doing so, the Court found "on this record . . . that Sierra Club has alleged in good faith and proved a continuing violation within the meaning of Gwaltney. App. 8a-9a. (Emphasis supplied).

The Court of Appeals properly found that Sierra's jurisdictional allegations met the Gwaltney test. In this Court's words, a citizen-plaintiff in a Clean Water Act case must make "a good faith

allegation of continuing or intermittent violation." Id., 98 L.Ed. 2d 306, 321. Sierra's Complaint, filed October 31, 1984, satisfies this jurisdictional requirement:

> 14. Defendant has violated the waste water discharge limits contained in its NPDES Permit, as set forth in a letter to the Defendant dated August 31, 1984, attached hereto as Exhibit A and incorporated by reference herein.

App. 74a. Sierra's 60-day letter charged that Simkins:

> has violated and continues to violate an "effluent standard or limitation" under §505(a)(1)(A) of the Act.

App. 76a. (Emphasis added). Simkins' assertion that "the complaint did not allege that the past violations were ongoing" (Petition at 21-22) is wrong. The lower court properly rejected Simkins' argument that the complaint should be read without reference to the letter that was incorporated into and attached to it.

The trial court properly granted summary judgment in Sierra's favor on the facts before it, and the Court of Appeals did not err in affirming those finding of facts. The trial court considered uncontroverted evidence that Simkins was continuing to violate the Clean Water Act, not only when Sierra filed suit, but also at the time of trial. Sierra Club's proof at trial was simple and uncontested by Simkins. Simkins, which uses one million gallons of river water a day, discharges part of its effluent back into the Patapsco River. Simkins held a permit which allowed it to discharge wastewater into the Patapsco only on the conditions that it sample its discharge monthly, retain records of the sampling for three years or the duration of any suit under the Clean Water Act, and file quarterly reports or DMRs attaching the monthly sampling results reports with the State of Maryland.

Simkins took no samples for 977 days. It failed to file any of the quarterly reports. It has never produced any records of the monthly sampling data which it is still, to this day, required to maintain. The uncontroverted evidence in the record was, and still is, that Simkins has continued to violate the terms of its permit.

Although Simkins characterizes its violations as "paperwork errors,"[3] Simkins' failure to sample its effluent, keep records of its discharges, and report its contents eviscerates the Clean Water Act.[4] As stated by this Court, "The Clean

---

[3] App. 20a.

[4] Simkins incorrectly argues that the Railey affidavit is limited to reporting violations and not Mr. Railey's concern about Simkins' failure to retain records of its discharges. Mr. Railey asserted under oath: "I have an interest in monitoring the discharge of effluents into the Patapsco River." Simkins was unable to report the quality and the quantity of its discharge because it had no records in its possession concerning its discharge.

Water Act (Act), 86 Stat. 816, 33 U.S.C. §1251 et. seq. (1982 ed. and Supp. III), was enacted in 1972 'to restore and maintain the chemical, physical and biological integrity of the nation's waters.' Section 1251(a)." Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., 484 U.S. _____, 108 S.Ct. 276, 98 L.Ed. 2d 306, 314 (1987). The Clean Water Act provides a mechanism to control unlimited pollution by requiring dischargers to obtain discharge permits. 33 U.S.C. §1342. Those permits require dischargers to sample their wastewater and report to the states, so that the states know what is going into the water. Failure to report under the Clean Water Act is a substantive and continuing violation of the law for the same reason that failure to file tax returns is a substantive and continuing violation of the Internal Revenue Code: the enforcement of

the law is dependent on the enforcement of the reporting requirements.

At no time during discovery, at no time during the trial, and at no time during the post-trial motion phase of the litigation, did Simkins ever come forward with the missing data on its discharges.[5/] On September 30, 1984, Simkins filed a report, supposedly for the quarter ending on that date, that contained no information for July or August.[6/]

5/ Nor did Simkins propound any interrogatories to explore the scope of Sierra's claim.

6/ Petitioner urges on this Court the idea that it began to comply with the Act on August 29, 1984. It then incorrectly asserts that the Fourth Circuit "contradicted an express funding of the District Court" of this purported fact. Petition at 17, Fn13. The Fourth Circuit stated that the Petitioner commenced compliance after Sierra mailed its 60-day letter, meaning that Simkins did not attempt to file a report until September 30, 1984. The report Simkins filed on that date was incomplete and has never been supplemented.

The trial court accepted the uncontroverted evidence that Simkins did no sampling and filed no reports for almost three years. To this day, Simkins has never come forward with the missing information and is, in fact, thereby still in violation of the Act.[7/] The report that Simkins filed on October 1, 1984 was incomplete. Simkins did not file a complete report until January 15, 1985, roughly fifteen weeks after the

---

7/ Simkins relies on Judge Murray's findings that Simkins began filing DMRs in October, 1984. Judge Murray did not find that October, 1984 DMR was complete. Indeed, the uncontroverted evidence is that it was not complete.

Sierra Club filed suit.[8/]

The Fourth Circuit properly declined to remand the case on the issue of ongoing violations because the record is adequate on this point. Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd., 844 F.2d 170 (4th Cir. 1988) required remand because the trial court "did not make a direct finding as to whether citizen-plaintiffs proved the existence of intermittent or sporadic violations constituting an ongoing

---

8/ Simkins asserts that the Fourth Circuit's opinion on this point is a non-sequitur because the DMR was not due until January 28, 1985. Petition at 25. Simkins misses the point. Sierra Club argued, and the Fourth Circuit held, that January 15, 1985 was the first time that Simkins filed a complete DMR. Prior to January 15, 1985 the evidence is uncontroverted that Simkins was never in compliance.

violation." 844 F. 2d at 172. In Simkins, however, the trial court made factual findings that Simkins failed to file the DMRs, which under Gwaltney confer jurisdiction.

The record below supports the Court of Appeals' finding of jurisdiction under Gwaltney, and the uncontroverted facts in that record lead to no other conclusion. Therefore, this Court need not grant certiorari on the factual issues of the sufficiency of either Sierra's allegations or of its proof of continuing violations by Simkins.

II. THIS COURT SHOULD NOT GRANT CERTIORARI BECAUSE

A. PETITIONER'S ARGUMENT ABOUT STANDING IS BASED ON THE INCORRECT FACTUAL ASSUMPTION THAT PETITIONER'S VIOLATIONS HAD CEASED ON THE DATE RESPONDENT FILED SUIT; AND

B. THIS COURT HAS PREVIOUSLY CONSIDERED PETITIONER'S REDRESSABILITY ARGUMENT IN GWALTNEY AND IN OTHER CASES.

A. PETITIONER'S ARGUMENT ABOUT STANDING IS BASED ON THE INCORRECT FACTUAL ASSUMPTION THAT PETITIONER'S VIOLATIONS HAD CEASED ON THE DATE RESPONDENT FILED SUIT.

This Court need not reach Petitioner's constitutional argument regarding the standing of Respondent to maintain a citizen's suit under the Clean Water Act. Petitioner poses this question to the Court: "Once a past violation has been abated and injunctive relief is no longer appropriate, does a citizen have Article III standing to procure the assessment of penalties payable to the United States Treasury?" Petition at 15. The factual premise of that question is that Simkins' violations were past, thus foreclosing injunctive relief. That premise

bears no relation to the record in this case. As set forth in Section I, supra, the uncontradicted evidence in this case was that Simkins was still violating its permit on both the date the lawsuit was filed and the trial date.

In the ~~inst~~ant case, Sierra sought two remedies: (1) injunctive relief in the form of a survey of that part of the Patapsco River which is straddled by the Simkins plant, and (2) an assessment of penalties that would deter Simkins and other industries from acting illegally in the future. Each of the two remedies explicitly redresses Sierra's injuries.

Sierra repeated its request for injunctive relief throughout the proceedings. See Paragraphs B, F of Complaint, App. 75a. At the summary judgment hearing, Sierra stated: "We are going to, at the appropriate

time your Honor, assuming you award penalties, we are going to ask this Court to establish an environmental trust fund with this money which can be used to monitor and clean up pollution in this area. . . ." (J.A. 89-90). At trial, Sierra sought an environmental survey:

> . . . [T]he survey is necessary because, one, not having the DMRs filed, we must determine what, if anything, is the level of the toxicity of the stream at this point for the purpose of determining what, if any, attempts should be and/or be made to clean it up. (J. A. 143).

Sierra's expert witness, toxicologist Dave Wright, Ph.D. explained the uncontested need for a survey. In closing argument, Sierra reiterated its demand for an environmental survey:

> The importance of requiring that [the environmental survey] is to give notice to other persons along the stream, that if they fail to comply with state regulations, they may be required

> to go back and develop by much more expensive survey, what if any damage has been done to that stream, and be required to pay the cost of doing so. (J.A. 268).

The fact that Sierra could reasonably seek such relief (to determine the ongoing effect of not having the DMR information) itself affords standing. Though the District Court did not grant Sierra's request for injunctive relief, it was not for want of standing. The District Court simply imposed a civil penalty of $977,000, and awarded counsel and expert fees, and costs. A court's denial of a litigant's request for a certain remedy does not, as Petitioner would contend, retroactively deprive that litigant of standing to seek that remedy.

B. THIS COURT HAS PREVIOUSLY CONSIDERED PETITIONER'S REDRESSABILITY ARGUMENT IN GWALTNEY AND IN OTHER CASES.

This Court need not grant certiorari because it has previously fully answered Petitioner's redressability arguments. In Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484, U.S. _____, 98 L.Ed. 2d 306, 108 S.Ct. 376 (1987) this Court made it clear that citizens in Clean Water Act cases may seek penalties payable to the United States Treasury. "If the citizen prevails in such an action, the court may order injunctive relief and/or impose civil penalties payable to the United States Treasury. §1365(a)." 98 L.Ed. 2d 306, 314. In the face of this Court's explicit statement that citizens may seek penalties payable to the Treasury, Petitioner now asserts that the statute authorizing such a claim is unconstitutional. Since Gwaltney answers this argument, this Court should deny the Petition.

The Supreme Court has also considered in Gwaltney and other cases Petitioner's argument that the remedy in this case does not redress Petitioner's injuries. The Petitioner in Gwaltney made a similar redressability argument:

> The Government recognizes that an ongoing violation is an Article III predicate to a constitutional citizen suit, but then suggests that Article III redressability concerns are satisfied when the citizen plaintiff alleges that he is adversely affected by an ongoing violation--even if the allegation turns out to be untrue. Gov. Br. 21 n.34. This Court, however, has repeatedly stressed that mere allegations are insufficient to meet the requirements of Article III. [footnote omitted]. The facts establishing an Article III case or controversy "must affirmatively appear in the record," and "it is not 'sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings.'" [footnote omitted]. Here it is "undisputed" that Gwaltney's

violations ceased before suit. (Citations omitted.) Any allegations to the contrary cannot be relied upon to satisfy the redressability requirement of Article III.

Reply Brief of Petitioner in Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., pp. 17-18.

Both the majority and the concurring opinion in Gwaltney considered this argument. The majority stated:

> Petitioner contends that failure to require proof of allegations under §505 would permit plaintiffs whose allegations of ongoing violation are reasonable but untrue to maintain suit in federal court even though they lack constitutional standing. Petitioner reasons that if a defendant is in complete compliance with the Act at the time of suit, plaintiffs have suffered no injury remediable by the citizen suit provisions of the Act. Petitioner, however, fails to recognize that our standing cases uniformly recognize that allegations of injury are sufficient to invoke the jurisdiction of a court. In Warth v. Seldin, 422 U.S. 490, 501 (1975),

> for example, we made clear that a suit will not be dismissed for lack of standing if there are sufficient "allegations of fact" -- not proof -- in the complaint or supporting affidavits. [Footnote omitted].
>
> * * * *
>
> Petitioner also worries that our construction of §505 would permit citizen-plaintiffs, if their allegations of ongoing non-compliance become false at some later point in the litigation because the defendant begins to comply with the Act, to continue nonetheless to press their suit to conclusion. According to petitioner, such a result would contravene both the prospective purpose of the citizen suit provisions and the "case or controversy" requirement of Article III. Longstanding principles of mootness, however, prevent the maintenance of suit when "'there is no reasonable expectation that the wrong will be repeated.'" United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953) (quoting United States v. Aluminium Co. of America, 148 F. 2d 416, 448 (CA2 1945).

484 U.S. _____, 108 S.Ct. 376, 98 L.Ed. 2d. 306, 322, 323 (1987).

Judge Scalia concurred:

> While Gwaltney did not seek certiorari (or even appeal to the Circuit Court) on the denial of its motion to dismiss for lack of standing, it did raise the standing issue before us here, see Reply Brief for Petitioner 17-18, and we in any event have an obligation to inquire into standing where it is doubtful, see Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986).

484, U.S. ____ 108 S.Ct. 376, 98 L.Ed. 2d. 306, 325 (1987).

In Warth v. Seldin, 422 U.S. 490 (1975), cited by this Court in Gwaltney, this Court analyzed the Article III standing issue:

> Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief. [Footnote omitted].
>
> * * *
>
> Moreover, Congress may grant an express right of action to persons who otherwise would be barred by prudential standing

> rules. Of course, Art III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of possible litigants. E.g., United States v. SCRAP, 412 U.S. 669, 37 L. Ed. 2d 254, 93 S. Ct. 2405 (1973). But so long as this requirement is satisfied, persons to whom Congress had granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and indeed, may invoke the general public interest in support of their claim. E.g. Sierra Club v. Morton, supra at 737, 31 L. Ed. 2d 636, 92 S. Ct. 1361; FCC v. Sanders Brothers Radio Stations, 309 U.S. 470, 477, 84 L. Ed. 869, 60 S. Ct. 693 (1940).

Warth v. Seldin, 422 U.S. 490, 500-01, 45 L. Ed. 2d 343, 95 S.Ct. 2917 (1975).

Sierra Club v. Morton, 405 U.S. 727 (1972) established the principle that a citizens' group in an environmental case has standing if the defendant's wrongful conduct affected any of the activities of members of the group.

In 1981, this Court recognized that a citizen-plaintiff in a Clean Water Act case had standing even though the citizen-plaintiff would not receive the penalty judgment himself:

> "Citizen" is defined in the citizen-suit provision of the FWPCA as a "person or persons having an interest which is or may be adversely affected." §505(g), 33 U.S.C. §1365(g). It is clear from the Senate Conference Report that the phrase was intended by Congress to allow suits by all persons possessing standing under this Court's decision in Sierra Club v. Morton, 405 U.S. 727, 31 L.Ed. 636, 92 S.Ct. 1361 (1972). See S Conf Rep No. 92-1236, p.146 (1972). This broad category of potential plaintiffs necessarily includes . . . plaintiffs seeking to enforce these statutes as private attorneys general, whose injuries are "noneconomic" and probably noncompensable . . . .

Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n., 453 U.S. 1, 17 (1981).

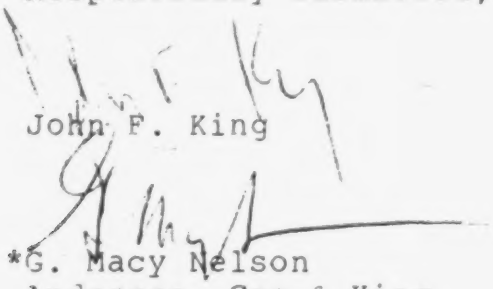
The District Court's entry of a judgment for $977,000 in penalties fairly redresses Sierra's injury. The penalty should deter other dischargers from violating their NPDES permits. Deterrence of pollution by others is, itself, sufficient to confer standing on Sierra Club. Since the District Court had jurisdiction, it had authority pursuant to §1365(c) to award civil penalties and/or injunctive relief. The choice it made has no impact on Sierra's standing to seek either remedy.

Petitioner's arguments about standing are not relevant to the record in this case. This Court has already considered and resolved those arguments in a proper case. This case presents no issues to distinguish it from this Court's holding in Gwaltney.

CONCLUSION

For each of the foregoing reasons, this Court should deny the writ.

Respectfully submitted,



John F. King

*G. Macy Nelson
Anderson, Coe & King
201 N. Charles Street
Suite 2000
Baltimore, Maryland 21201
(301) 752-1630

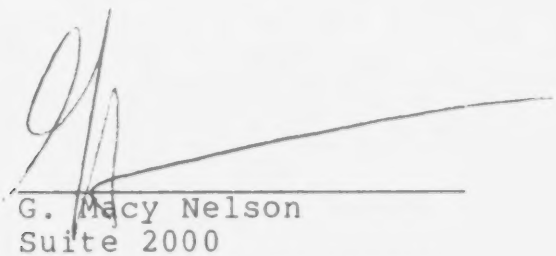
*Counsel of record.

November 18, 1988

4851B

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of November, 1988, a copy of the foregoing was mailed, first class mail, postage prepaid, to: David F. Albright, Esquire, Harley Thomas Howell, Esquire, Semmes, Bowen & Semmes, 250 W. Pratt Street, Baltimore, Maryland 21201, counsel for Petitioner.



G. Macy Nelson
Suite 2000
201 N. Charles Street
Baltimore, Maryland 21201